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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

19 SAN LUIS OBISPO COASTKEEPER,
20 LOS PADRES FORESTWATCH,
21 CALIFORNIA COASTKEEPER
ALLIANCE, and THE ECOLOGICAL
RIGHTS FOUNDATION.

22 Plaintiffs.

23 || VS

24 COUNTY OF SAN LUIS OBISPO

Defendant

Case No: 2:24-cv-06854 SPG (ASx)

**DEFENDANT COUNTY OF SAN
LUIS OBISPO'S OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION TO STAY OR IN
THE ALTERNATIVE QUASH
DEPOSITION SUBPOENAS FOR
BENJAMIN PITTERLE, GORDON
HENSLEY, AND CYNTHIA
REPLOGLE**

Date Action Filed: August 13, 2024
First Amended Complaint Filed:
December 27, 2024

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1 The Court should deny the *ex parte* application seeking to preclude the
2 County from deposing three of Plaintiffs' standing witnesses, as these individuals
3 have already voluntarily submitted themselves to the jurisdiction of this Court and
4 directly inserted themselves into this matter by submitting declarations and making
5 multiple sweeping claims and assertions, and Plaintiffs have refused to either
6 withdraw these individuals as standing witnesses or stipulate that they will not rely
7 on these individuals for purposes of trying to demonstrate standing in this matter.
8 Plaintiffs have the burden of demonstrating standing, a Constitutional requirement
9 for maintaining an action, and fairness and justice dictate that the County should be
10 permitted to depose these three standing witnesses if Plaintiffs intend to rely on
11 them going forward. The *ex parte* application should also be denied because it is
12 both procedurally and substantively deficient.

13 **I. PLAINTIFFS FAIL TO DEMONSTRATE "LACK OF FAULT" AND**
14 **"IRREPARABLE PREJUDICE" REQUIRED FOR THE COURT TO**
15 **CONSIDER THEIR EX PARTE APPLICATION**

16 **A. The legal standard for considering Ex Parte Applications**

17 Local Rule 37-3 instructs that “[u]nless the Court in its discretion otherwise
18 allows, no discovery motions may be filed or heard on an ex parte basis absent a
19 showing of irreparable injury or prejudice not attributable to the lack of diligence
20 of the moving party.” L.R. 37-3. The Court “highly disfavors” *ex parte*
21 applications that are due to the applicants “lack of diligence” or “a crisis of the
22 applicant’s own making.” Standing Order for Newly Assigned Civil Cases, Judge
23 Sherilyn Peace Garnett, Jan. 10, 2025, at p. 16, available at
24 <https://www.cacd.uscourts.gov/honorable-sherilyn-peace-garnett> (last accessed
25 May 16, 2025) (citing *Mission Power Engineering Co. v. Continental Cas. Co.*,
26 883 F. Supp. 488 (C.D. Cal. 1995)).

27 *Ex parte* applications are “rarely justified” and “appropriate only in a narrow
28 set of circumstances.” *Sifi Networks Fullerton, LLC v. Berkshire Hathaway*

1 *Specialty Ins. Co.*, No. 8:23-cv-01417-FWS-JDE, 2025 U.S. Dist. LEXIS 4118, *2
2 (C.D. Cal. Jan. 8, 2025) (citations omitted). Courts recognize that they are
3 “inherently unfair,” “pos[ing] a threat to the administration of justice” because “the
4 parties’ opportunities to prepare are grossly unbalanced” and the application
5 “forces [opposing counsel] to drop all other work to respond on short notice.”
6 *Mission Power Engineering Co. v. Continental Cas. Co.*, 883 F. Supp. at 490; *see*
7 *also Klene v. Riggs*, CV 22-8318-KK-JCx, 2024 U.S. Dist. LEXIS 240173, *4
8 (C.D. Cal. Dec. 13, 2024); *SiFi Networks Fullerton, LLC*, No. 8:23-cv-01417-
9 FWS-JDE, 2025 U.S. Dist. LEXIS 4118, at *4 (Ex parte applications “impose an
10 unnecessary adversarial burden on opposing counsel who are required to make a
11 hurried response under pressure, usually for no good reason”) (quoting *Horne v
12 Wells Fargo Bank, N.A.*, 969 F. Supp. 2d 1203, 1205 (C.D. Cal. 2013)). The
13 County notes that its counsel has indeed been forced to drop everything, including
14 other work on this litigation and work for other clients on other matters, to address
15 Plaintiffs’ literal midnight filing of this Application. Declaration of Katherine
16 Felton (“Felton Decl.”), at ¶ 3.

17 To justify invoking *ex parte* procedures the movant is required to
18 demonstrate that (1) they are without fault in creating the crisis necessitating *ex
19 parte* relief or it is the result of excusable neglect *and* (2) that the moving party’s
20 cause will be “irreparably prejudiced” if the underlying motion is heard according
21 to regular procedures. *Mission Power Engineering Co.*, 883 F. Supp. at 492; *Klene
22 v. Riggs*, 2024 U.S. Dist. LEXIS 240173, *4-5.

23 The *ex parte* application should be denied because Plaintiffs cannot
24 demonstrate they exercised diligence in this matter or that any “irreparable
25 prejudice” would result from the County deposing three individuals that Plaintiffs
26 assert they will rely on for purposes of establishing standing in this matter –
27 individuals that also already inserted themselves into this litigation by submitting
28 declarations making sweeping claims and assertions. The temporal “crisis” about

1 which they now complain is entirely of their own making; and the purported
2 “irreparable prejudice” to the Plaintiffs and standing witnesses amounts to nothing
3 more than proceeding with depositions that carry with them the regular and
4 expected “burden” facing any litigant or witness in a lawsuit.

5 As detailed below, Plaintiffs designated the standing witnesses as witnesses
6 they expect to call at trial in their initial disclosures served October 18, 2024.
7 Felton Decl., Ex. 1.¹ Plaintiffs have known the County intends to depose the
8 standing witnesses since at least November 2024 when the parties prepared and
9 filed the Discovery Plan. ECF No. 50-1 at 10. Plaintiffs waited 25 days after the
10 County requested deposition dates to seek this relief. Prior to doing so, the
11 Plaintiffs engaged in a series of tactics to delay and avoid responding to the
12 County. First, Plaintiffs refused to provide deposition dates for the standing
13 witnesses ***until the depositions that Plaintiffs wanted to take*** were scheduled.
14 ***Next***, Plaintiffs simply ignored the County’s renewed request for dates and waited
15 more than a week to respond. Following that, Plaintiffs ***next*** argued they did not
16 have to provide dates, in part, because the County had not issued deposition
17 subpoenas. ***Next***, Plaintiffs agreed to accept service of the deposition subpoenas
18 and to waive fees, and they provided addresses for the location of two of the four
19 depositions, but still did not provide dates. When the County issued deposition
20

21 1 Plaintiffs made the following statement in their Initial Disclosures: “[T]he
22 following individuals may be called by the Plaintiffs to support the factual
23 component of their assertions of standing and, to the extent required, irreparable
24 harm to the Plaintiffs’ from the County’s Endangered Species Act and California
25 state law violations: Gordon Hensley, Benjamin Pitterle, Cynthia Replogle, and
26 Sean Bothwell. One or more of these witnesses may also be called by the
27 Plaintiffs to support the factual component of Plaintiffs’ organizational standing.
28 In addition, Plaintiffs may designate one or more additional witnesses to address
organizational standing. Each of these potential witnesses may be reached through
Plaintiffs’ counsel.” Felton Decl., Ex. 1 at 5 (excerpted pages of Plaintiffs’ Initial
Disclosures served October 18, 2024).

1 subpoenas based on this information, Plaintiffs **next** objected to the dates the
2 County selected. **Finally**, Plaintiffs tried to unilaterally dictate the County's
3 method of discovery (demanding written discovery in lieu of depositions), and to
4 condition standing discovery on a series of impossible stipulations. When the
5 County refused to bow to these tactics, Plaintiffs resorted to filing a midnight *ex*
6 *parte* application with this Court. Plaintiffs could and should have raised their
7 objections using regular motion procedures long ago and certainly when the
8 County asked for dates almost a month ago. Instead, they played games to evade
9 setting the depositions, which the County timely requested and is entitled to
10 conduct.

11 **B. Plaintiffs created their own temporal crisis**

12 Plaintiffs have known that the County planned to seek discovery on standing
13 issues, including deposing Plaintiffs' standing witnesses, since at least November
14 2024 when the Parties prepared and filed the Discovery Plan. ECF No. 50-1. The
15 County stated expressly in the Discovery Plan that it "reserved all rights to conduct
16 discovery into, and to challenge, the standing of individuals that Plaintiffs have
17 offered up as the basis for their standing in this case." ECF No. 50-1 at 9. This
18 included "deposing the following standing witnesses proffered by the NGOs:
19 Gordon Hensley; Benjamin Pitterle; Sean Bothwell; and Cynthia Replogle." ECF
20 No. 50-1 at 10.

21 The County requested that Plaintiffs provide dates for the standing witness
22 depositions 25 days before Plaintiffs filed this *ex parte* application. On April 21,
23 2025, the County's counsel emailed Plaintiffs and requested that they "identify
24 dates between May 14 and May 30 that each of Plaintiffs' four standing witnesses
25 are available for purposes of us taking their depositions." Felton Decl., ¶ 5, Ex. 2.
26 On April 22, 2025, Plaintiffs' counsel responded that Plaintiffs would require the
27 depositions they were seeking to be set **before** Plaintiffs would "discuss[] the
28 scheduling, format, and number of depositions of Plaintiffs' standing witnesses."

1 Felton Decl., ¶ 6, Ex. 3. Although Rule 26(d)(3)(B) plainly states that “discovery
2 by one party does not require any other party to delay its discovery,” Fed. R. Civ.
3 P. 26(d)(3)(B), Plaintiffs unilaterally decided to refuse to engage in setting the
4 standing witness depositions at that time.

5 On April 24, 2025, the County tried again to set the standing witness
6 depositions writing to Plaintiffs’ counsel and requesting that they “[p]lease provide
7 the dates between May 14 and May 30 for the standing witness depositions.”
8 Felton Decl., ¶ 7, Ex. 4. Counsel for the County pointed out to Plaintiffs’ counsel
9 that the County had provided the information that Plaintiffs’ counsel sought
10 regarding the County’s 30(b)(6) depositions. *Id.* Plaintiffs did not respond for
11 more than a week. On May 2, 2025, Plaintiffs’ counsel continued to refuse to
12 provide dates for the standing witness depositions. Felton Decl., ¶ 8, Ex. 5.
13 Plaintiffs’ rationale for refusing to provide available dates for their standing
14 witnesses was, in part, that the County had not issued subpoenas to the witnesses.
15 Felton Decl., Ex. 5. Plaintiffs further refused to cooperate to schedule the
16 depositions without a meet and confer. *Id.*

17 The parties conducted a meet and confer on May 5, 2025. During that
18 meeting, the County’s counsel requested, and Plaintiffs’ counsel agreed, to waive
19 formal service of the standing witness deposition subpoenas, to accept service of
20 deposition subpoenas on their behalf, and to waive the witnesses’ deposition fees
21 and mileage. Felton Decl., ¶ 9. Plaintiffs’ counsel memorialized their
22 commitment in an email to the County’s counsel the following day on May 6,
23 2025. Felton Decl., Ex. 6. Plaintiffs’ counsel stated in the email:

24 ***Sean Bothwell will sit for the deposition*** at California Coastkeeper
25 Alliance’s Sacramento office, which is located at 1100 11th Street,
26 Sacramento, California 95814. ***Ben Pitterle will sit for the deposition***
27 at Los Padres ForestWatch’s office, which is located at 1900 State
28 Street, Suite E, Santa Barbara, California 93102. ***We will provide***

1 *addresses for the remaining as we are able to confirm with the*
2 *standing witnesses.*

3 *Id.* (emphasis added). Thereafter, the County promptly issued subpoenas for the
4 standing witness depositions the same day. Felton Decl., ¶ 10, Ex. 7. In the
5 transmission, the County’s counsel reiterated that the depositions would be remote,
6 and that the location designated for the depositions of Gordon Hensley and Cynthia
7 Replogle was based on the best available professional address information that the
8 County had for these individuals. Felton Decl., Ex. 7. The County’s counsel
9 advised that “[i]f a different address should be designated for either of these
10 witnesses, then please provide it to us and we will reissue those subpoenas.” *Id.* In
11 addition, counsel advised plaintiffs that “[i]f any deposition date identified in a
12 subpoena does not work for a particular individual, then please provide three
13 alternative dates in May that they are available.” *Id.*

14 On May 8, 2025, Plaintiffs’ counsel objected to the subpoenas on grounds
15 the dates were not available to the witnesses and claimed the subpoenas did not
16 provide “reasonable notice.” Felton Decl., Ex. 8. Plaintiffs insisted on a further
17 meet and confer before any depositions were scheduled demanding the County
18 reveal “what it is the County seeks to learn from standing witness depositions.” *Id.*
19 On May 9, 2025, the County responded, providing dates for a further meet and
20 confer and refuting Plaintiffs’ position that the County is required to make a
21 showing before deposing Plaintiffs’ standing witnesses. Felton Decl., Ex. 9.

22 On May 12, 2025, Plaintiffs continued to object to the deposition dates
23 without providing alternatives. Felton Decl., Ex. 10. The County responded the
24 same day that it would reissue the subpoenas provided Plaintiffs identify dates
25 from a list of dates in late May and early June. Felton Decl., Ex. 11.

26 The parties conducted a further meet and confer on May 13, 2025. Felton
27 Decl., at ¶ 15. During that meet and confer Plaintiffs refused to withdraw any of
28

1 their standing witnesses, or stipulate that they would not rely on any of the
2 standing witnesses going forward. *Id.*

3 On May 15, 2025, Plaintiffs' counsel threatened that they would proceed
4 with an *ex parte* application if the County would not agree to untenable conditions
5 limiting the County's rights to proceed with the standing witness depositions.
6 Felton Decl., Ex. 12. The County refused, and after midnight on May 16, 2025,
7 Plaintiffs filed their application. ECF No. 121.

8 Plaintiffs have known for months the County intends to depose their
9 standing witnesses. For the past 25 days, Plaintiffs have engaged in tactical delays
10 and gamesmanship to prevent the County from taking the depositions concerning
11 the foundational issue of the Plaintiffs' standing to assert claims in this case. In
12 doing so, Plaintiffs wasted the County's time and created their own inability to
13 raise this issue in a timely, properly noticed motion using the standard motion
14 process such that it could be heard before the June 13, 2025 fact discovery
15 deadline. ECF No. 79-1. Because Plaintiffs cannot demonstrate that they did not
16 create their own crisis, the Court should exercise its discretion not to entertain
17 Plaintiffs' midnight application.

18 **C. The “irreparable prejudice” Plaintiffs assert is nothing more than
19 proceeding with four depositions which entail no more than the
20 regular, expected burdens of any witness deposition**

21 Even if Plaintiffs could demonstrate a lack of fault, Plaintiffs cannot show
22 “irreparable prejudice or harm” from not being heard *ex parte* on this matter. The
23 only result will be that the three depositions proceed in the normal course,
24 according to the Federal Rules of Civil Procedure and the Discovery Plan, on a
25 date before June 13, 2025 – the fact discovery deadline.

26 Notably, Plaintiffs' only argument why the standing depositions should not
27 occur rests on the tenuous claim of “burden” to the standing witnesses. However,
28 each of the standing witnesses has chosen voluntarily to serve in that capacity in

1 this litigation, and they have already submitted declarations in this matter making
2 sweeping claims and assertions that the County should be permitted to test. This
3 distinguishes them from witnesses who do not choose to be involved in litigation
4 but nonetheless are by virtue of circumstances outside their control (e.g., the
5 bystander witness to an automobile accident). There are inherent duties and
6 commitments that standing witnesses must be prepared to accept in electing to
7 serve in that capacity. The so-called “burdens” that Plaintiffs point to amount to
8 nothing more than the standard burden placed on any witness in litigation. This
9 “burden,” when weighed against the County’s fundamental right to probe
10 statements made by these witnesses in their declarations through live questioning,
11 and the foundational significance of standing as a jurisdictional prerequisite for
12 Plaintiffs’ right to assert claims in this lawsuit, do not rise to the level of undue
13 burden or excessive cost that results in lack of proportionality under Rule 26(b)(1).
14 Fed. R. Civ. P. 26(b)(1).

15 In fact, depositions are likely the most expedient, efficient and cost-effective
16 way to proceed on the standing issues. Many of the statements the witnesses have
17 made in their declarations contain sweeping assertions that cannot be adequately
18 probed and tested through written discovery. This is especially true given that
19 lawyers often stand between the respondent and the questioning party when
20 preparing responses to written discovery. The County has made it clear that the
21 depositions will be remote, at a location chosen by Plaintiffs and their witnesses,
22 on a date in May on which their witnesses are available. Felton Decl., Ex. 7.² The
23

24 ² Plaintiffs identify a spotty home internet connection as a particular burden for
25 Mr. Hensley. ECF No. 121 at 9. However, the County initially noticed his
26 deposition to take place remotely from the office address of his consulting
27 business, Gordon Hensley-Environmental, which to the best information available
28 to the County is in the core downtown business center of San Luis Obispo- just
blocks from the County offices. Felton Decl., Ex. 7. If Mr. Hensley truly cannot
access a reliable internet connection at his home or office, the deposition could

1 costs associated with four depositions cannot be said to be unreasonably
2 burdensome, particularly in this matter where Plaintiffs seek to substantially
3 reduce, and in some instances potentially cut-off the water supply to thousands of
4 residents, businesses, and agricultural fields.

5 While Plaintiffs complain that the court reporting and transcription costs
6 associated with these standing witness depositions will be “hard costs” that
7 purportedly represent a large portion of the budget Plaintiffs anticipated when
8 bringing this action (ECF No. 121 at 9-10), this complaint rings hollow for
9 multiple reasons. First, the fact that the Plaintiffs may have had an unreasonable
10 expectation of the costs (apparently less than \$100,000) of litigating a major matter
11 in federal court does not justify precluding the County from taking the depositions
12 of standing witnesses that Plaintiffs continue to rely on and refuse to withdraw.
13 Second, as demonstrated by documents that the County has produced to Plaintiffs,
14 this litigation has already cost the County in excess of \$1 million, an enormous
15 cost that the County did not budget for at all prior to Plaintiffs bringing this action.
16 Third, while Plaintiffs complain about court reporter and transcription costs for
17 three depositions set by the County, Plaintiffs have set full day depositions of two
18 of the County’s consultants and five County employees – one of whom has been
19 deposed for 7 hours in her *individual* capacity and will sit for *another* 7-hour
20 deposition in a 30(b)(6) capacity.

21 Plaintiffs’ argument that the depositions sought by the County are too
22 numerous and too costly simply fails the straight face test given what is at issue
23

24 alternatively occur live in a conference room at the County’s offices. This
25 removes any need to rent space by Mr. Hensley or Plaintiffs. ECF No. 121 at 10
26 (asserting Mr. Hensley must “incur additional costs to procure a location with
27 suitable internet connect for the deposition” and that “such costs would represent a
28 large portion of the costs the non-profit environment group Plaintiffs have
budgeted to bring this action.”).

1 (water for thousands of residents, businesses, and agricultural fields), the costs
2 Plaintiffs have already forced the County to incur, and the fact that Plaintiffs are
3 taking twice as many depositions as the County with no complaints about cost.

4 **II. PLAINTIFFS ARE REQUIRED TO DEMONSTRATE THEIR
5 STANDING AT EACH STAGE OF THE LITIGATION AND THE
6 COUNTY IS ENTITLED TO TAKE DISCOVERY TO ASCERTAIN
7 WHETHER PLAINTIFFS HAVE MET THEIR BURDEN**

8 **A. Standing is a jurisdictional requirement under Article III of the
9 Constitution**

10 There is no dispute that Plaintiffs must demonstrate standing to bring this
11 action under Article III of the Constitution, which confines the jurisdiction of
12 federal courts to cases and controversies. *FDA v. All. for Hippocratic Med.*, 602
13 U.S. 367, 378 (2024) (“The case or controversy requirement limits the role of the
14 Federal Judiciary in our system of separated powers.”). Standing is “a bedrock
15 constitutional requirement.” *U.S. v. Texas*, 599 U.S. 670, 675 (2023).

16 “[T]he irreducible constitutional minimum of standing contains three
17 elements.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). These are (1)
18 injury, (2) causation, and (3) redressability. First, Plaintiffs must establish injury
19 in fact, that is, injury that is concrete and particularized and also actual or
20 imminent. *Id.* The injury must affect would-be plaintiffs in a “personal and
21 individual way” – this requirement screens out plaintiffs who “have only a general
22 legal, moral, ideological, or policy objection to a particular government action.”
23 *FDA*, 602 U.S. at 381. Second, Plaintiffs must demonstrate the injury likely was
24 caused or likely will be caused by the defendant’s conduct. *Lujan*, 504 U.S. at
25 560. Third, Plaintiffs must show that the injury is likely to be redressed by a
26 favorable judicial decision. *Id.* at 561.

27 “The party invoking federal jurisdiction bears the burden of establishing
28 these elements.” *Lujan*, 504 U.S. at 561. Further, as the Supreme Court explained

1 in *Lujan*, “each element must be supported in the same way as any other matter on
2 which the Plaintiff bears the burden of proof, i.e., with the manner and degree of
3 evidence required at the successive stages of the litigation.” *Id.* The burden of
4 proof necessary to establish standing increases as the action proceeds. *Davis v.*
5 *FEC*, 554 U.S. 724, 734 (2008).

6 Additionally, where, as here, Plaintiffs seek to establish associational
7 standing, the Supreme Court applies a three-part associational standing test:

8 an association has standing to bring suit on behalf of its members
9 when: (a) its members would otherwise have standing to sue in their
10 own right; (b) the interests it seeks to protect are germane to the
11 organization's purpose; and (c) neither the claim asserted nor the relief
12 requested requires the participation of individual members in the
13 lawsuit.

14 *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

15 **B. The County is entitled to utilize the methods of discovery it deems
16 appropriate to ascertain whether Plaintiffs have standing**

17 Plaintiffs seek to establish standing via four standing witnesses: Sean
18 Bothwell, Gordon Hensley, Brian Pitterle, and Cynthia Replogle. All four of these
19 witnesses previously submitted declarations in this matter in support of Plaintiffs'
20 motion for preliminary relief. ECF Nos. 13-3, 13-4, 13-5, 13-6. And all four
21 provided subsequent standing declarations. ECF Nos. 121-2, 121-3, 121-4, 121-5.
22 Sean Bothwell states he is the Executive Director at California Coastkeeper
23 Alliance, one of the four named Plaintiffs. ECF No. 121-5, ¶ 4 (“I am currently the
24 Executive Director at California Coastkeeper Alliance”). Gordon Hensley is the
25 San Luis Obispo Coastkeeper, also a named Plaintiff in the action. ECF No. 121-
26 3, ¶ 4 (“I have been designated by the international Waterkeeper Alliance as the
27 San Luis Obispo Coastkeeper since 2002.”). Brian Pitterle indicates he is both a
28 member of Los Padres ForestWatch and the organization's Director of Advocacy

1 and Field Operations. ECF No. 121-2, ¶¶ 2, 6. Like California Coastkeeper
2 Alliance and San Luis Obispo Coastkeeper, Los Padres ForestWatch is a named
3 Plaintiff. Cynthia Replogle states she is a member of California Coastkeeper
4 Alliance and considers herself aligned with San Luis Obispo Coastkeeper. ECF
5 No. 121-4, ¶¶ 6, 7.

6 Each of these standing witnesses has made the decision to put themselves in
7 the position of serving as a standing witness in this litigation. Each has
8 volunteered that “if called as a witness in these proceedings, I could and would
9 testify competently thereto under oath.” ECF Nos. 13-3 ¶ 1, 13-4 ¶ 1, 13-5 ¶ 1, 13-
10 6 ¶ 1. The standing witnesses “put their credibility at stake” by submitting
11 declarations to support Plaintiffs’ standing. *NRDC, Inc. v. Ill. Power Res., LLC*,
12 2015 U.S. Dist. LEXIS 138824, at *10 (C.D. Ill. Oct. 13, 2015).

13 In addition, in the Rule 26(f) Report filed with the Court, Plaintiffs stated
14 “Plaintiffs’ standing witnesses include Cynthia Replogle, Benjamin Pitterle,
15 Gordon Hensley, and Sean Bothwell.” ECF No. 50. Plaintiffs characterize the
16 individual standing witnesses as “non-party” witnesses, ECF No. 121 at 11; yet
17 Hensley has declared he is the San Luis Obispo Coastkeeper, Bothwell has
18 declared he is the Executive Director of California Coastkeeper Alliance, Pitterle
19 has declared he is a member of and Director of Advocacy and Field Operations for
20 Los Padres ForestWatch, and Replogle has declared she is a member of California
21 Coastkeeper Alliance. They are not unrelated third parties. Thus, Plaintiffs’
22 reliance on *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300
23 F.R.D. 406 (C.D. Cal. 2014), which involved a subpoena issued to a third party
24 who was not being relied upon to establish that the court had jurisdiction and who
25 had not previously, voluntarily submitted a declaration that purportedly provided
26 the basis for jurisdiction, is unpersuasive.

27 Under Rule 26(b), the County “may obtain discovery regarding any
28 nonprivileged matter that is relevant to any party's claim or defense and

1 proportional to the needs of the case” Fed. R. Civ. P. 26(b). Because
2 standing is a threshold jurisdictional issue, *Lujan*, 504 U.S. at 561 (holding
3 elements of standing are “not mere pleading requirements but rather an
4 indispensable part of the plaintiff’s case”), it is plainly relevant to both Plaintiffs’
5 claims and the County’s defense. Absent standing, this Court is deprived of
6 jurisdiction to hear this matter.

7 Rule 26(d)(3) states that unless the parties stipulate or the Court orders
8 otherwise, “methods of discovery may be used in any sequence.” Fed. R. Civ. P.
9 26(d)(3). Thus, it is the County’s prerogative to depose Plaintiffs’ standing
10 witnesses. Plaintiffs argue without reference to supporting evidence that “[t]he
11 usual approach in environmental citizen suits is for standing to be decided based
12 upon affidavits or declarations submitted by the plaintiffs, such as those submitted
13 here.” ECF No. 121 at 11. The fact that in some cases the standing of plaintiffs is
14 determined by the court based on affidavits or declarations does not mean that this
15 is “the usual approach” as Plaintiffs claim. There are innumerable cases, including
16 U.S. Supreme Court decisions, where the standing of plaintiffs is determined
17 based, in part, on deposition testimony. E.g., *Friends of the Earth, Inc. v. Laidlaw*
18 *Env'l. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (wherein the Supreme Court
19 examined affidavits and deposition testimony from members of plaintiffs’
20 organizations to determine that plaintiffs had standing); *Lujan v. Defenders of*
21 *Wildlife*, 504 U.S. 555, 563-564 (1992) (wherein the Supreme Court examined
22 affidavits and deposition testimony from a member of plaintiff’s organization to
23 determine that plaintiff did not have standing); *Wildlands v. Scott Timber Co.*,
24 2018 U.S. Dist. LEXIS 125977 (D. Or. July 27, 2018) (wherein the district court
25 examined declarations and deposition testimony from two members of plaintiff’s
26 organizations to determine that plaintiffs had standing); *ASPCA v. Feld Entm’t,*
27 *Inc.*, 677 F. Supp. 2d 55 (D.D.C. 2009), *aff’d* 659 F.3d 13 (D.C. Cir. 2011) (where
28

1 a federal district court examined deposition and trial testimony from a plaintiff and
2 determined that he lacked standing).

3 **C. Depositions of each of the standing witnesses are warranted**

4 Plaintiffs contend that because Sean Bothwell, one of Plaintiffs' four
5 identified standing witnesses, has agreed to sit for a deposition, the others need not
6 be deposed. ECF No. 121 at 10, 12. Plaintiffs characterize the County's intent to
7 depose the other three standing witnesses as "duplicative," "excessive," and
8 "unnecessary." *Id.* at 12. This presupposes that Mr. Bothwell has standing and
9 will continue to for the duration of the litigation. Plaintiffs cannot avoid discovery
10 by presupposing it is unnecessary. And the County has a right to question each of
11 the four individual standing witnesses Plaintiffs intend to rely upon. The County
12 offered on more than one occasion to withdraw the deposition notices of any of the
13 four individual standing witnesses if Plaintiffs agreed not to rely on those
14 individuals to support their standing. *E.g.*, ECF No. 122-2. But Plaintiffs
15 repeatedly rejected this offer. In other words, Plaintiffs insist that they must be
16 able to continue to rely all four individual witnesses to establish standing
17 (including by calling them as witnesses at trial as explained in Plaintiffs' initial
18 disclosures, Felton Decl., Ex. 1 at 5) but refuse to allow the County to depose those
19 witnesses.

20 A party is not obligated to reveal the specific questions it will ask in advance
21 of a deposition, and Plaintiffs have not identified any authority to the contrary.
22 Moreover, Plaintiffs certainly have not disclosed the questions it would ask in
23 advance of any of the depositions it has already taken, or that it still plans to take in
24 this matter. Nevertheless, as to the general subject matter of the depositions, the
25 County can confirm that it will focus its inquiry on the statements made in the
26 declarations that the standing witnesses previously submitted to the Court in
27 support of Plaintiffs' preliminary injunction motion, the subsequent "standing
28 declarations" that Plaintiffs provided, and other factual matters that are relevant to

1 each individual satisfying or not-satisfying the mandatory standing requirements
2 under Article III of the U.S. Constitution.

3 **III. CONCLUSION**

4 Plaintiffs failed to establish that they meet the pre-requisites to seek *ex parte*
5 relief from the Court. Plaintiffs engaged in weeks of delay tactics and
6 gamesmanship with the County in refusing to set the depositions of Plaintiffs'
7 standing witnesses. Rather than raising the issue through regular motion
8 procedures, Plaintiffs wasted weeks of the County's time and created the "crisis"
9 about which they now complain. Standing is a Constitutional jurisdictional
10 prerequisite to Plaintiffs' ability to proceed with this litigation. As such, the
11 County has a right to depose Plaintiffs' standing witnesses. Plaintiffs have not
12 established any undue burden or cost that would result from these depositions.
13 Accordingly, the Court should deny Plaintiffs' *ex parte* application.

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15 Date: May 18, 2025

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